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No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

PAUL L. DOUGLAS
Attorney General

SHANLER D. CRONK
Special Assistant Attorney General

2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682

Attorneys for Petitioners

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

Petitioners are compelled to set straight several factual inaccuracies contained in respondent's statement of the case. The legislative chamber prior to the chaplain's invocation is characterized by a general milling about, some legislators standing and some sitting, and while most stand when the chaplain begins, not all listen or even heed the fact that the invocation is being offered (R 80-82, 121-122).

Legislative prayer books were printed on three occasions as a result of separate motions from the floor and were intended for distribution primarily to the legislative membership as is evidenced from the scant number of copies authorized in each of those three years. Any public requests for copies of the prayer book were honored as the supply would permit (JA 13). There is no evidence of the denomination of any other clergyman considered for the post of Chaplain in 1979.

Executive Board Chairman Lewis testified that *he* knew of no prior non-Christian chaplains (JA 69), but he also testified that he had only served in the Legislature since 1972 (TR 108) and there is no other evidence regarding denominations of prior chaplains. While Lewis testified that he was not sure the Legislature would approve of a Buddhist Monk or a Sioux Indian Medicine Man providing the morning invocation each day for 15 years (JA 69-70), he did not state that the Legislature would completely object to such persons, nor did he concede that most legislators would object to a non-Christian being appointed chaplain as respondent flatly asserts on page 2 of his brief.

Finally, in all his 16 years in service as chaplain, Palmer's prayers have on only one occasion offended anyone, and then only one Jewish senator (JA 49).

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ARGUMENT

I.

Respondent's argument that the Nebraska legislative prayer practice inherently is a "religious activity" forclosed by the Establishment Clause simply because it employs prayer has no basis either in the authority or the record.

Respondent's central argument is that prayer, apparently in any context, by definition is always a "religious activity" which can have no other effect but to advance religion in the manner prohibited by the Establishment Clause, and with which government for that reason cannot be associated. The several variations on this theme employed in his brief cannot obscure the fact it calls into question only the use of prayers by the Legislature. The prayer issue is outside the scope of the question presented for review as framed by this court and is improper for consideration herein.

At trial, respondent based his challenge to the legislative prayer practice on a single issue—the propriety of the use of prayers (JA 13). The district court clearly validated the saying of the prayers, per se (Pet. App. 13, 20), and that specific question was raised by respondent on cross-appeal to the Eighth Circuit Court of Appeals (JA 17). That court just as clearly declared it did not hold the prayers alone to be unconstitutional, citing and discussing its early decision of *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979) (Pet. App. 37). *Bogen* had involved prayers opening county board meetings by volunteer clergy and the Court of Appeals had found such use

of prayers to advance a clearly secular purpose of establishing a solemn atmosphere and serious tone for the meetings, going so far as to suggest that this was the primary effect of all invocations at such public gatherings of persons with different views on religion (Pet. App. 35-36).

Respondent did not pursue the prayer issue before this court by cross-petition for writ of certiorari, and in its limited grant of petitioners' application the court framed the question presented as whether the compensation or retention of a single chaplain for an extended period of time invalidates the Nebraska legislative prayer practice (JA 109). Rather than direct his attention to that question, respondent puts forth an argument that not only falls outside the scope of the question presented, but also amounts to a separate basis for invalidating the legislative prayer practice, the effect of which would be to broaden the judgment of the Court of Appeals in his favor. Such a result cannot be countenanced. *See, Mills v. Electric Auto-Light Co.*, 396 U. S. 375, 381, n. 4 (1970); *Strunk v. United States*, 412 U. S. 434, 437 (1973).

Even if considered, the argument fails on the merits. It pends on the proposition that because of its content, a prayer necessarily advances religion.[1] That this propo-

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1 This argument also implies that "prayer" is susceptible to definition, yet respondent's own evidence proves otherwise. References to deity, on which he concentrated attention in this case, do not control the definitional question, for his own expert witness testified that any utterance expressing one's feelings for "the unknown or the mysteries of life or the universe itself or cosmos" (JA 37) might be considered prayers, and he

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sition is nonsensical is easily demonstrated. It would invalidate the reading of the same prayers during the course of a legislative filibuster, though such a practice obviously could not be said to advance religion. Respondent does not recognize that the very articulation of the tripartite test in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), manifests a reluctance to conclude that any particular activity can be deemed definitionally to advance religion in every context. Moreover, in drawing distinctions between impermissible activities of a religious nature and permissible ones this court on several occasions has referred specifically to legislative prayers as examples of the permissible.[2] Respondent's failure even to acknowledge these expressions is conspicuous.

More notably, the very cases cited by respondent undercut his argument. It is true that this court acknowledged the religious nature of the regent's prayer at issue in *Engel v. Vitale*, 370 U. S. 421 (1962), but it also found that the state admitted the prayer was in furtherance of an official policy of spiritual training in the public schools, *id.* at 422, which was characterized as "an officially approved religious doctrine of the state." *Id.* at

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further added that utterances without references to deity could nonetheless be prayerful simply because of "the mood that is created, the beauty of the statements themselves, the contemplative aspect of them." (JA 38).

2 *McCollum v. Board of Education*, 333 U. S. 203, 253 (1948); *Zorach v. Clauson*, 343 U. S. 306, 312-13 (1952); *Engel v. Vitale*, 370 U. S. 421, 435 (1962); and Mr. Justice Stewart's dissent at 446; *School District of Abington Township v. Schempp*, 374 U. S. 203, 214 (1963), and Mr. Justice Brennan's concurrence at 299-300.

436. Similarly, the religious nature of Bible readings in the public schools of Pennsylvania and Maryland was recognized in *School District of Abington Township v. Schempp,* 374 U. S. 203 (1963), but in striking that practice down the court was careful to point out findings of fact that the readings were intended or admitted by those states to serve as genuine religious ceremonies. *Id.* at 223-224. In fact, the court suggested that under different circumstances such readings might be permitted for inspirational purposes or for the teaching of secular subjects. *Id.* at 223.

In *Epperson v. Arkansas,* 393 U. S. 89 (1968), also cited by respondent, this court rejected that state's attempt to prevent school teachers from discussing the theory of evolution, but only after determining that "no suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 107-108.

In each of these cases, the prayers, readings, or teachings involved were not examined in a vacuum, but were determined impermissible only because they furthered an underlying religious purpose which itself was established in the record as a matter of fact. No such underlying purpose or effect is present here as was specifically found by the district court upon review of all relevant facts and circumstances (Pet. App. 13-15).

II.

Respondent's argument on "primary effect" is grounded on misinterpretations of decisions which involve activities so dissimilar from that at issue herein as to be inapplicable in any event.

Acknowledging that resolution of this case will turn principally on the issue of primary effect, respondent makes two arguments in that regard. The first—that there is an impermissible effect simply because prayer is involved—has just been dispatched. When he finally turns attention to the compensation and tenure of the legislative chaplain—the only issues actually before this court—he grounds his arguments on language abstracted from decisions of cases involving facts and circumstances wholly dissimilar to those herein.

A. Larkin v. Grendel's Den, Inc., Did Not Espouse Any Doctrine of Symbolic Benefit to Religion as Respondent Suggests and This Case Does Not Lend Itself to Disposition Under the Controlling Principles of That Decision.

Respondent's contention that the Nebraska Legislative prayer practice provides a significant symbolic benefit to religion generally, tantamount to a primary effect advancing religion, is grounded on the application of this court's recent decision of *Larkin v. Grendel's Den, Inc.*, 51 U. S. L. W. 4025 (1982). He perceives that decision to announce a new doctrine of Establishment Clause law to the effect that any involvement of government with re-

ligion which might give the appearance of symbolically reaffirming the importance of religion is impermissible (Brief of Respondent, pp. 44-45).

Respondent grossly misconstrues *Larkin*. The Massachusetts statute there in question granted churches power to veto certain liquor license applications. The court carefully pointed out that this was a discretionary governmental power, ordinarily vested in agencies of government, which had been transferred to religious institutions, with the result that such institutions were empowered to prescribe certain rights, obligations, and burdens among the public having nothing to do with religion and subject to no overriding standards.

The Nebraska legislative prayer practice stands in stark contrast to the situation encountered in *Larkin*. The practice involves no function or power of government vis-a-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs. Moreover, religious institutions play no role here, the chaplain serving in his individual capacity rather than as a representative of his church (JA 50-51). This is not changed by the fact of either his compensation or tenure. Any benefit to religion resulting therefrom surely is only of an incidental nature and permitted by the First Amendment. *Roemer v. Board of Public Works*, 426 U. S. 736, 746-747 (1976).

The reference to a symbolic benefit to religion made by the court in *Larkin*, and seized upon by respondent,

neither was the determinative factor in that case, nor an attempt to espouse a new doctrine of Establishment Clause law. There is no indication that the court would find similar symbolic benefit to religion in any situation that did not involve granting religious institutions the very power and authority to govern. Respondent has failed to heed the admonition of this court in an earlier Establishment Clause case of which he was reminded by the district court (Pet. App. 16):

> In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Walz v. Tax Commission, 397 U. S. 664, 668 (1970).

B. Respondent's Conclusion That the Compensation and Tenure of the Nebraska Chaplain Amounts to an Official Preference For One Religious View Has Support Neither in the Record Nor Controlling Authority.

Respondent actually makes only one argument regarding primary effect addressed to the precise question presented herein, the compensation and tenure of the Nebraska chaplain. On pages 47-50 of his brief, he characterizes the retention and compensation of Chaplain Palmer for 16 years as an official preference for one re-

ligious sect, apparently felt prohibited by *Larson v. Valente*, — U. S. —, 102 S. Ct. 1673 (1982).[3]

Petitioners first point out that the facts upon which this argument is grounded are not found in the record. He states that the dominant faith in Nebraska is Protestant and that no one except a Protestant has ever served as chaplain. There is no evidence in the record bearing out these points. He also asserts that in Massachusetts the chaplains of both houses have always been Catholic, citing *Colo. v. Treasurer and Receiver General*, 392 N. E. 2d 1195 (1979). The court therein plainly found "that not all legislative chaplains in Massachusetts have been Roman Catholic." *Id.* at 1199.

In addition to factual inaccuracies, respondent misapplies *Larson* as a matter of law. That case involved a Minnesota statute imposing certain registration and reporting requirements upon only those religious organizations soliciting more than 50 percent of their funds from nonmembers. The threshold question was whether or not the statute resulted in an official preference for certain religious denominations. The court so found on the basis that the statute made "explicit and deliberate distinc-

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3 The logical extension of this argument reveals its irrationality. Since it assumes that a cleric can be identified only with a single denomination, manifested either by his prayers or church affiliation, whether the current chaplaincy is too Christian or Judeo-Christian as Respondent claims actually would be irrelevant. So long as *any* identifiable religion is not reflected in the chaplaincy, some preference by respondent's definition is unavoidable. His confusion stems from the fact that he presents what essentially is an equal protection argument which fails to fit into the framework of the Establishment Clause inquiry. *See, Colo. v. Treasurer and Receiver General*, 392 N. E. 2d 1195, 1199 (1979).

tions between different religious organizations." *Larson v. Valente, supra* at 1684, n. 23. This determination was concluded consistent with the rule of *Gillette v. United States,* 401 U. S. 437 (1971), to the effect that it is critical to the finding of official preference that a statute *on its face* discriminates on the basis of religious affiliation or belief. *Larson, supra* at 1684, n. 23. In *Gillette,* 401 U. S. at 452, the court also determined that where a challenged statute or activity does not explicitly manifest a preference, none will be found *de facto* so long as there is a neutral, secular basis for whatever lines of distinction have materialized from government action.

Properly viewed, this case hardly is controlled by *Larson.* The legislative rules herein challenged respect only an internal, procedural matter for the Legislature rather than an exercise of legislative power directed at the public, and have nothing whatsoever to do with particular religious institutions, but are concerned only with procuring the personal service of an individual. More significantly, the rules neither explicitly nor implicitly make distinctions between different religious organizations; indeed, they do not even require the chaplain to be a clergyman. Chaplain Palmer's continued retention is not attributable to any preference for Presbyterianism, but rather to the simple fact that he has done a good job providing a daily ceremony never considered a big deal by the Legislature. *See,* Petitioner's Brief, page 38. Thus, there is a neutral, secular basis for his retention.

The only issue genuinely raised in this case regards the possibility of some public perception that Palmer's retention reflects a preference for his particular religious

views. No doubt there are some who might take offense to such a situation, for this court recognized in *Zorach v. Clauson*, 343 U.S. 306 (1952), "A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" *Id.* at 312-313. Nevertheless, in furtherance of a judicial policy of benevolent neutrality between government and religion this court has permitted such indirect, remote or incidental effects on religion, as opposed to direct and immediate effects which realistically advance religion.

Furthermore, to require Chaplain Palmer, simply because of his affiliation with one religious denomination, to be replaced by another chaplain to perform the identical service would amount to nothing less than discrimination against Palmer because of his denominational affiliation. Petitioners once again submit that such a result would contravene the principle of *Bradfield v. Roberts*, 175 U.S. 291 (1899) and *McDaniel v. Paty*, 435 U.S. 618 (1978), upholding the right of a cleric of a particular faith to be in the secular service of government. Respondent's brief fails to address this issue squarely raised by petitioners (*see*, Petitioners' Brief, pp. 39-40).

III.

The contention that the retention of Chaplain Palmer over a several year period manifests the kind of political divisiveness forbidden by the Establishment Clause is specious and grounded on facts not contained in the record.

Respondent's shallow attempt to demonstrate that an impermissible degree of political divisiveness has re-

sulted from Chaplain Palmer's tenure is an obvious over-exaggeration and again relies on facts simply not contained in the record. He notes on page 52 of his brief that after a prayer delivered by a guest chaplain, several Jewish members of the Legislature felt compelled to express their discomfort to Reverend Palmer, when in fact only a single legislator was discomforted by the prayer and even then did not directly communicate same to the chaplain (JA 49).

He also asserts that in 1979, "several members of the Legislature sought to replace" Palmer with a Lutheran clergyman suggesting the existence of a hotly debated issue throughout the legislative chamber (Brief of Respondent, p. 52). Executive Board Chairman Lewis made clear that the 1979 mix-up resulted from confusion over whether the incoming or outgoing Executive Board was to make the recommendation, rather than from any dissatisfaction with Palmer (R118-120). Moreover, nowhere does the record reveal the denominational affiliation of the other cleric, who also could have been Presbyterian.

As this court has indicated, the requisite political divisiveness is found either where the activity in question involves substantive issues which engender serious division along religious lines, or necessitate a degree of continuing oversight and involvement by government which itself is of a politically volatile nature. *See, Lemon v. Kurtzman,* 403 U. S. at 623; *Roemer v. Maryland Board of Public Works,* 426 U. S. at 749, 765-766; and *Meek v. Pittenger,* 421 U. S. 349, 372 (1975). Since the prayer practice is not an exercise of the Legislature's power vis-a-vis the public, but respects only an internal administrative matter, it stretches the limits of credulity to find either of

those facets in this case. Noting that the trial court did not even see a political divisiveness issue from the evidence adduced at trial, how the Court of Appeals could infer it without a single citation to the record is baffling and certainly erroneous.

IV.

This particular case can be resolved by historical considerations unique to legislative prayer practices without announcing a broad new general exception to the application of the Establishment Clause.

To obscure the compelling historical considerations surrounding legislative prayer practices of the kind employed in Nebraska which are illuminated by petitioners and the United States as amicus curiae, respondent passes them off as espousing a broad new exception to the existing body of Establishment Clause law. He also makes an ill-fated attempt to draw significant distinctions between the earliest federal chaplaincies and that employed by the Nebraska Legislature.[4]

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4 Respondent first notes that the earliest chaplains of the Congress rotated from house to house, apparently believing such a practice would tend more toward the permissibility of legislative chaplaincies. To the contrary, as Mr. Justice Brennan pointed out in *School District of Abington Township v. Schempp*, 374 U. S. at 278, n. 54, the absence of rotation suggests the practice has been religiously insignificant. In any event, the fact that the first congressional chaplains were rotated in no way changes the fact that for decades they were all Protestant with one exception and served lengthy individual terms (Brief for United States, pp. 16-17). Respondent's argument misses the relevant point.

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Petitioners and the United States in their respective briefs have demonstrated the particular relevance of history in interpreting the Establishment Clause where a practice challenged today was in existence and approved in identical form by the drafters of the First Amendment

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He also asserts that the early chaplains were "generally volunteer", when the undisputed evidence is that except for a few years in the 1850's they have been paid from the outset, and he contends that the first federal chaplains were not officers of the House or Senate in reliance on the statement contained in Hinds', *Precedents of the House of Representatives of the United States*, § 275, at 153 (1907) (Brief for Respondent, p. 63). The statement respondent relies on is factually inaccurate as further examination demonstrates.

The Hinds' statement is derived from House debate which occurred in 1860. *Id.* § 273, at 152. The debate was over whether the House should abandon the brief experiment in the late 1850's with volunteer chaplains. On February 28, 1860, Representative Millson offered, as a privileged question, a resolution that the House proceed "to elect a Chaplain, who shall officiate during the present Congress, alternately with the Chaplain already elected by the Senate." Cong. Globe, 36th Cong., First Sess. 902 (1860). Representative Burnett objected asserting the question was not privileged because the chaplain was not "an officer of the House, necessary to compete its organization." *Id.* Millson responded "that, from the foundation of the government until the present day . . . the House of Representatives has elected a Chaplain as part of its organization." *Id.* Whereupon the Speaker ruled in favor of Burnett's objection. *Id.*

A week later, Millson renewed his resolution and stated: "The Constitution provides that House shall choose its Speaker and other officers. It is, then, a question of privilege for the House to determine what officers it will choose. I do not say the House must elect the Chaplain; but I say it is for the House to determine whether they will have a Chaplain among its other officers." *Id.* at 992 (1860). The Speaker reversed his ruling of the previous week declaring "[s]ince then, the Chair has looked into the precedents, and finds that they are in favor of the question being privileged." *Id.* at 993. And the House supported Millson's view that "it is for the House to determine whether they will have a Chaplain among its other officers." *Id.*

at the very time of its drafting. (*See,* Petitioners' Brief, p. 24; Brief for the United States, pp. 9-12). To refute the obvious compelling nature of these unique historical considerations, respondent and his amici, *Jon Garth Murry, et al.,* cite the court to its decision in *Brown v. Board of Education,* 347 U. S. 43 (1954) which they note found historical considerations surrounding the issue of segregation in the public schools "inconclusive". Closely examined, *Brown* is seen to actually support petitioners' historical analysis.

The court in *Brown,* prior to its decision, had called upon the parties to discuss at reargument a number of questions, including what evidence existed regarding whether Congress and the states contemplated or did not contemplate that the enactment of the Fourteenth Amendment would abolish segregation in the public schools. After reargument, the court concluded that the presentation of the parties and its own investigation was "inconclusive" on this point, for the reason that the movement toward free common schools supported by general taxation had not yet taken hold at the time of the Fourteenth Amendment. *Id.* at 489-490. Thus, the court in *Brown* did not reject the kind of historical inquiry petitioners suggest here, but found simply that such an inquiry could resolve that particular case.

By contrast, the history of legislative chaplaincies demonstrates that they had "taken hold" by the time Congress proposed the First Amendment. Such practice was approved by the Congress in the form of a compensation

statute only three days before.[5] (see Brief of United States, p. 11). With the two cases so distinguished, and mindful that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the Religious Clause of the First Amendment", *Everson v. Board of Education*, 330 U. S. 1, 26 (1947), the conclusion that the drafters of the Establishment Clause intended that it would permit legislative prayer practices is inescapable.

V.

The printing of legislative prayer books is not a part of the official legislative chaplaincy and was improperly considered by the Court of Appeals.

While petitioners have demonstrated in their main brief that the printing of prayer books on three separate occasions poses no Establishment Clause problem if considered an element of the legislative prayer practice, they did not intend thereby to waive their contention that the prayer books in fact are not part of the practice and were

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5 Respondent notes that not all of the framers of the First Amendment were in favor of legislative chaplains, mentioning Rutledge, Jay, and Madison. This very point actually reinforces the conclusion that while perhaps not the unanimous view, it was the considered judgment of the framers of the First Amendment as a deliberative body that legislative chaplaincies were permitted by the religion clauses. That James Madison may have changed his mind on this question some 30 years later does not obscure the fact that as a member of the first Congress in 1789, he served on the House Committee proposing the appointment of a House chaplain and he voted to compensate the chaplains. *See*, Brief for United States, p. 12.

improperly considered by the lower courts in their decisions. (*See,* Pet. App. pp. 22-23).

Respondent's complaint specifically sought to enjoin the implementation of specific legislative rules and statutes authorizing the very office of legislative chaplain and the compensation of the chaplain (JA 6-7). The common denominator of these activities was their relation to the sole claim he pursued, the unconstitutionality of legislative prayers. The post of chaplain, the compensation of the chaplain, and the funding of prayer books were merely adjuncts to the utilization of prayer.

The district court validated the use of the prayers, but surprisingly in view of respondent's case, found an independent basis for invalidating the chaplain's compensation and the funding of prayer books. Although essentially reaching the same conclusion on the merits, the Court of Appeals specifically rejected the district court's segmentation of the elements of the prayer practice, being of the view that respondent challenged the practice "as a whole" (Pet. App. 33-34). So viewed, the Court of Appeals took into consideration not only the occasional past funding of prayer books, which was not raised on appeal by petitioners (JA 15-16), but went so far as to find "the publishing of prayer books is similarly an impermissible part of such practice." (Pet. App. 38). Thereby, the Court of Appeals committed error.

First, to the extent that a legislative prayer practice "as a whole" is even capable of being discerned, it surely does not include the prayer books. They are required neither by legislative rule nor statute, as is the case with

the other elements singled out by the district court, and it is those rules and statutes which embody any "official" chaplaincy. Rather, the three separate printings of prayer books occurred in prior years as a result of separate motions from the floor of the Legislature, apparently made at the personal whim of the movant on each occasion. There simply has never been any *official* act for respondent to enjoin in that regard. Moreover, since he failed to make every legislator a party to the action, the courts are without the capability of providing him the relief he has requested even if they were inclined to do so.

There is another flaw in the reasoning of the Court of Appeals. While the recommendation of a chaplain and the daily invocations reasonably could have been anticipated at the time of filing respondent's complaint, because they were required by legislative rule, this is hardly the case with the likelihood of any subsequent motions from the floor to again print prayer books. That expectancy was subject to the kind of speculation and conjecture rendering it far from ripe for judicial review. *See, O'Shea v. Littleton,* 414 U. S. 488, 497-498 (1974). This being so, subject matter jurisdiction with regard to this question was and is lacking. In view of the foregoing, and by virtue of respondent's failure to cross-petition for certiorari on this issue, resolution of the question presented herein properly must confine itself to the compensation and tenure of the Nebraska legislative chaplain.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this court reverse the decision of the Court of Appeals.

Respectfully submitted,

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral, Petitioners,

By PAUL L. DOUGLAS
Attorney General

By SHANLER D. CRONK
Special Assistant Attorney General

Attorneys for Petitioners